VERMONT ENVIRONMENTAL BOARD
10 V.S.A., Chapter 151

RE: Vermont Gas Systems, Inc. by
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MEMORANDUM OF DECISION
Motion to Alter Decision
Land Use Permit #4C0609-EB

On December 6, 1985, Vermont Gas Systems, Inc. ("VGS") filed with the Environmental Board ("the Board") a Motion to Alter the Board's decision of November 22, 1985. On December 11, the City of Burlington ("Burlington") filed a memorandum in opposition to the VGS motion, and two written responses to the VGS motion were filed by the City of Winooski ("Winooski"). Finally, on January 6, 1986, VGS and Burlington jointly filed a Motion to Dismiss Burlington's appeal and Winooski filed a memorandum in opposition to the latter motion on January 7, 1986.

I. Motion to Alter Decision

We will not reconsider or restate findings and conclusions previously set forth in our November 22 decision. However, we will address four issues raised by the VGS motion to alter.

1) Our previous decision does not contemplate a duplicative review as suggested by VGS. In circumstances where VGS proposes to install gas mains and distribution systems within the confines of a project which is already subject to an Act 250 permit (Re: Fairfield Associates, Ltd., #4C0570, for example) and the latter permit approves the installation of utility systems including gas lines, no additional Act 250 approval is required. In this situation, VGS, as a contractor with the Permittee, is obligated by the terms of the underlying Act 250 permit to the extent that they address the installation of subsurface utility systems. However, any extension of a distribution main to reach a permitted project site, together with new service connections from that main, is subject to the jurisdictional test discussed at pages 4-11 of our November decision. Therefore, if a gas main extension is required to reach the boundaries of the Fairfield site, an Act 250 permit will be required if the extension constitutes a "substantial change."

2) We agree with VGS that jurisdictional rulings regarding gas main extensions cannot be made until "a real plan at a specific site develops." VGS Motion at p. 5. We have avoided prejudging the applicability of Act 250 to VGS' future activities. However, in response to loud and frequent pleas from VGS, we endeavored to spell out the jurisdictional principles which would apply to future activities. Further, we established a simplified procedure for VGS to secure permits for its extensions. If VGS wishes to secure a case specific determination with regard to each extension, the

tools specified in EBR 3 remain available./1/ We have, however, made a final determination with regard to the 18 projects identified in VGS's "Schedule B." Contrary to VGS' belief (Motion at page 11), the process we have established will not require "numerous redundant applications" and will not "cause delays of several months." We require the filing of only one application for each project and only thirty days' lead time. This system is reasonable in view of the substantial rights afforded by Act 250 to affected parties including municipalities, planning commissions, regional planning commissions, adjoining property owners and State agencies.

3) Nor do we agree that the application process "will extract numerous charges amounting to thousands of dollars per year." Motion at page 11. EBR 11(D) is available to relieve VGS from the burden of multiple application fees. While that Rule leaves discretion in the hands of the Commission Chairman, we suggest that any project covered by the master permit approval which does not result in a hearing may qualify under EBR 11(D) for a fee waiver.

4) Finally, VGS requests that the proceedings be reconvened to provide VGS with the opportunity to rebut evidence introduced through Burlington witness Dr. Shahin. It argues that new information has been developed as a result of related Superior Court proceedings. VGS does not argue that this information was not available or could not be developed in advance of the Board's proceedings. In fact, VGS had the opportunity to depose Dr. Shahin in relation to the court case prior to Dr. Shahin's appearance as a witness in the Act 250 appeal proceedings. The "new information" identified by VGS was available to VGS before the close of the Board's proceedings and this case will not be reopened to hear that evidence.

In its response to the VGS motion, Winooski raises one additional issue: the City argues that Act 250 jurisdiction applies to the in-kind replacement of gas mains which were installed prior to June 1, 1970. This position is not supported by the Board's past decisions in this area. Our November decision states that no "change" occurs for the purposes of 10 V.S.A. § 6081(b) and EBR 2(G) if VGS installs replacement gas main of similar capacity in the same trench now occupied by main installed before June 1, 1970. This conclusion is similar to that reached in the two cases referred to by Winooski:

1) In Re: Windsor Correctional Center, D.R. 151 issued May 9, 1984, we suggested that the replacement of a failed septic tank leach-field disposal system with a

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/1/ We made this option clear in our November decision. See p. 22, paragraph 1.

similar system on the correctional center premises would not constitute a substantial change; however, the replacement of the existing system with a two-mile long sewer main resulting in treatment at a municipal sewage treatment plant did, we concluded, result in a substantial change.

2) In RE: Agency of Transportation (Leicester Route 7), D.R. #153 issued June 28, 1984, our focus was not on excavation, filling, and-regrading per se; rather, it was the conduct of those activities in association with a 48% increase in the width of Route 7 that lead us to conclude that more than in-kind replacement and ordinary repair was involved in the Transportation Department's proposal.

II. Motion to Dismiss

We decline to dismiss the Burlington appeal for several reasons. First, substantial time and effort have been invested by the parties and the Board in the disposition of this case. Second, we infer from Gloss v. The Delaware and Hudson Railroad Co., 135 Vt. 419 (1977) and the Supreme Court's reference by analogy to V.R.C.P. 41, that written consent of all parties is required prior to dismissal under 3 V.S.A. § 809(d). Neither the City of Winooski nor the Chittenden County Regional Planning Commission have stipulated to dismissal. Third, even should we dismiss the Burlington appeal, Winooski's appeal remains. Because the latter appeal is in reference to a "master permit" application and is not confined solely to impacts on the City of Winooski, there is no purpose served in dismissing the Burlington appeal: the amended permit issued in association with our November decision would remain intact and its terms would apply to all VGS projects located in Burlington which are identified on "Schedule A."

Finally, our final decision has been issued in this case and the VGS motion to alter has been denied. Any request to dismiss the appeal is untimely.

III. Order

Vermont Gas Systems' Motion to Alter is denied. The Burlington and Vermont Gas Systems joint motion to dismiss the Burlington appeal is denied.

Dated at Montpelier, Vermont this 30th day of January, 1986.

ENVIRONMENTAL BOARD

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